No. 03-20-00497-CV

In the Court of Appeals for the Third Judicial District
Austin, Texas

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Appellant,

v.

MOVE TEXAS ACTION FUND,

Appellee.

On Appeal from the 419th Judicial District Court, Travis County

APPELLANT'S RESPONSE TO APPELLEE'S EMERGENCY MOTION FOR A TEMPORARY ORDER TO REINSTATE TEMPORARY INJUNCTION

TO THE HONORABLE THIRD COURT OF APPEALS:

The Texas Election Code reflects the Legislature's carefully crafted framework for facilitating voting by Texans with disabilities, while also protecting the State's interests in election integrity, ballot security, voter confidence, and efficient election administration. Weeks before the 2020 election, with early voting already underway, Appellee asked the trial court to do away with a key element of that framework: Election Code § 102.002. Under § 102.002, voters who submit a certification that they have a disability that originated after the mail-in ballot application deadline may vote a late ballot. Texas offers this opportunity even though the Constitution does not require the State to do so. Nevertheless, the trial court granted Appellee's request to temporarily enjoin § 102.002.

Recognizing that the trial court's temporary injunction would inject confusion into the ongoing voting process, the Secretary tried to limit that damage by immediately filing an accelerated interlocutory appeal in this Court. This stayed the trial-court proceedings, TEX. CIV. PRAC. & REM. CODE § 51.014(b), and superseded the temporary injunction, *id.* § 6.001(b); TEX. R. APP. P. 24.2(a)(3), 29.1(b). In its "Emergency Motion for a Temporary Order to Reinstate Temporary Injunction" (Mot.), Appellee now asks this Court to bypass the Secretary's statutory right to supersedeas and "reinstate" the temporary injunction.

Granting Appellee's request for relief under Rule 29.3 would not just undermine the State's important election-related interests, it is also foreclosed by both the terms of the Rule and by Texas Government Code § 22.004(i). In enacting that provision, the Legislature made clear that no rule of procedure can be used as an end-run around the Secretary's right to automatic supersedeas, which cannot be counter-superseded. *See* TEX. GOV'T CODE § 22.004(i); TEX. CIV. PRAC. & REM. CODE § 6.001(b)(1)-(3). Because that is precisely the substantive relief Appellee's Motion seeks, the Court should deny that Motion.

BACKGROUND

Texas voters who meet the statutory definition of "disability" are eligible to vote absentee—either by mail or, in the case of a voter with a disability that originates after the mail-in ballot application deadline, by late ballot.[1] The Election Code

[1] Texas law also accommodates voters with disabilities in other ways. For example, "[i]f a voter is physically unable to enter the polling place . . . on the voter's request, an election officer shall deliver a ballot to the voter at the polling place entrance or curb." TEX. ELEC. CODE § 64.009(a). Moreover, "[t]he regular voting procedures

defines disability as "a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." TEX. ELEC. CODE § 82.002. The deadline to apply for a mail-in ballot (on grounds of disability or otherwise) is eleven days before the election. *Id.* § 84.007. If a "voter has a sickness or physical condition described by [§] 82.002 that originates on or after the day before the last day for submitting an application for a ballot to be voted by mail," then that voter "is eligible to vote a late ballot." *Id.* § 102.001(a).

Late-ballot applications are subject to the same requirements as timely mail-in ballot applications, plus one more, *viz.*

> An application for a late ballot must comply with the applicable provisions of [§] 84.002 and must include or be accompanied by a certificate of a licensed physician or chiropractor or accredited Christian Science practitioner in substantially the following form:
>
> "This is to certify that I know that _____ has a sickness or physical condition that will prevent him or her from appearing at the polling place for an election to be held on the _____ day of _____, 19__, without a likelihood of needing personal assistance or of injuring his or her health and that the sickness or physical condition originated on or after _____.
>
> "Witness my hand at _____, Texas, this _____ day of _____, 19__.
>
> _____
> (signature of physician, chiropractor, or practitioner)

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may be modified by the election officer to the extent necessary to conduct voting under this section," and "[o]n the voter's request, a person accompanying the voter shall be permitted to select the voter's ballot and deposit the ballot in the ballot box." *Id.* § 64.009(b), (d); *see also* 3.RR.106 (guidance from the Secretary that the "election judge may remind the symptomatic voter that they have the option to vote curbside and ask the voter if they would like to utilize that option.").

Id. § 102.002. This certification requirement is longstanding in Texas, and it is entirely consistent with federal law, which since 1984 has expressly permitted States to require a medical certification of any voter who seeks "to apply for an absentee ballot after the deadline has passed." Voting Accessibility for the Elderly and Handicapped Act, Pub.L. 98-435, § 5, Sept. 28, 1984, 98 Stat. 1679 (codified at 52 U.S.C. § 20104).

Nevertheless—just days before the start of early voting—Appellee MOVE Texas Action Fund (MOVE), a § 501(c)(4) corporation, challenged § 102.002 on the theory that it is unconstitutional as applied to individuals diagnosed with COVID-19 (though not any other disease) after the statutory deadline to apply for a mail-in ballot. *See* Mot.App.2.[2] MOVE named Appellant Texas Secretary of State (Secretary) and the Travis County Clerk, in their official capacities, as defendants. The Secretary filed a plea to the jurisdiction and response in opposition to MOVE's temporary injunction application.

On October 16, 2020, the trial court entered an order denying the Secretary's plea to the jurisdiction and enjoining § 102.002. *See* Mot.App.1 (Order). The trial court concluded that MOVE would likely succeed on its "claim that the requirement to obtain a doctor's certificate under Texas Election Code § 102.002 violates the Equal Protection Clause of the Texas Constitution on its face," enjoined the

[2] MOVE appended its live pleading—its First Amended Petition, filed October 9, 2020—to its Rule 29.3 motion. *See* Mot.App.2. It filed its Original Petition one week earlier on October 2, 2020. The Secretary's Plea to the Jurisdiction is also submitted as an appendix to Appellee's Rule 29.3 motion. Mot.App.3.

Secretary from enforcing or advising counties to enforce the same, and ordered the Secretary to circulate the Order to Texas's 254 counties. Order at 1-4.

Within the hour, the Secretary perfected her interlocutory appeal. Appellee concedes that, upon filing of the Secretary's notice of appeal, the trial court's "temporary injunction was superseded by operation of law and is not subject to being counter-superseded." Mot. 2 (quoting *Texas Gen. Land Office v. City of Houston*, No. 03-20-00376, 2020 WL 4726695, at *2 (Tex. App.—Austin Jul. 31, 2020, order); citing TEX. R. APP. P. 24.2(a)(3)); *see also id.* at 7 (noting that the Secretary's notice of appeal "automatically superseded the Injunction").

Nevertheless, Appellee asks this Court to "reinstate" that injunction under Texas Rule of Appellate Procedure 29.3, which provides the Court with limited power, "[w]hen an appeal from an interlocutory order is perfected," to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." TEX. R. APP. P. 29.3. This includes, for example, the power to stay all trial court proceedings during the pendency of an interlocutory appeal which does not automatically have that effect. *See, e.g.*, *Trulock v. City of Duncanville*, 277 S.W.3d 920, 923 (Tex. App.— Dallas 2009, no pet.). A movant under Rule 29.3 must show entitlement to relief by stating the relief sought, the basis for the relief, and the facts necessary to establish a right to the relief. *Lamar Builders, Inc. v. Guardian Sav. & Loan Ass'n*, 786 S.W.2d 789, 791 (Tex. App.—Houston [1st Dist.] 1990, no writ).

Appellee's requested relief is unavailable because the Legislature has explicitly provided that "the trial court must permit a judgment to be superseded" when entered against state appellants including the Secretary. TEX. R. APP. P. 24.2(a)(3).

This Court lacks authority to disregard that directive, either under Rule 29.3, or on any other basis. The three cases Appellee cites on this point do not change this result, and Appellee's Motion should be denied.

ARGUMENT

When and how state appellants may supersede a trial-court order or judgment pending appeal is "a policy question peculiarly within the legislative sphere." *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964) (orig. proceeding). The Legislature chose to allow state appellants—including the Secretary, as "the head of a department of this state," TEX. CIV. PRAC. & REM. CODE § 6.001(b)(3)—to supersede trial-court orders and judgments as a matter of right, *id.* § 6.001(a), (b). The Legislature recently reaffirmed that right, providing that *no rule of procedure* may give a trial court discretion to deny supersedeas to a state appellant except under narrow circumstances not applicable here. TEX. GOV'T CODE § 22.004(i); *see also* TEX. R. APP. P. 24.2(a)(3). The Secretary validly exercised that right when filing her notice of appeal. Thus, Rule 29.3 provides no basis upon which the Court may "reinstate" the preliminary injunction.

I. The Secretary's Notice of Appeal Superseded the Trial Court's Temporary Injunction Order.

For well over a century, the law has been clear that a state appellant's notice of appeal stays the effect of a trial court's injunction. "Since 1838, the State and its departments have been exempt from filing a bond to appeal an adverse judgment." *In re State Bd. for Educator Certification*, 452 S.W.3d 802, 804 (Tex. 2014, mem.).

In 1984, the rules were amended to give the trial court discretion whether to allow a supersedeas bond when the judgment did not involve money, property, or foreclosure. *See id.* at 806, n.22. Under the new rule, the trial court could decline to permit the judgment to be superseded if the party opposed to a state appellant posted its own bond deemed sufficient to "secure the defendant in any loss or damage occasioned by any relief granted if it is determined on final disposition that such relief was improper." *Id.* That bond is what we now call "counter-supersedeas."

For thirty years between 1984 and 2014, the interplay between this new rule and the longstanding state exemption from a bond created uncertainty and split appellate authorities regarding whether a trial court had discretion to deny supersedeas to a state defendant entitled to automatic supersedeas upon perfecting an appeal. *See id.* In December 2014, the Texas Supreme Court addressed the question, holding that trial courts had discretion, under Rule 24.2(a)(3), to deny supersedeas to state defendant-appellants upon request and sufficient bond posted by the plaintiff-appellee. *Id.* at 803.

In response to that ruling, the 85th Texas Legislature passed House Bill 2776, which directed the Texas Supreme Court to "adopt rules to provide that the right of an appellant under [§] 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, or any other rule." TEX. GOV'T CODE § 22.004(i); *see also* TEX. CIV. PRAC. & REM. CODE § 6.001(b)(1)-(3) (listing "this state," "a department of this state," and "the head of a department of

this state" as exempt from bond requirements). In April 2018, the Texas Supreme Court amended Texas Rule of Appellate Procedure 24.2 to provide:

> When the judgment debtor is the state, a department of this state, or the head of a department of this state, the trial court *must* permit a judgment to be superseded except in a matter arising from a contested case in an administrative enforcement action.

Tex. Supreme Ct., Order Adopting Amendments to TEX. R. APP. P. 24.2, Misc. Docket No. 18-9061, 43 TEX. REG. 2633 (Apr. 12, 2018) (emphasis added); TEX. R. APP. P. 24.2(a)(3) (effective May 1, 2018). Thus, any discretion a trial court *may* have had to deny supersedeas to a state appellant was legislatively eliminated.

This Court recently addressed a state appellant's supersedeas right in a case where the trial court awarded a temporary injunction to halt allegedly *ultra vires* actions. *Texas Educ. Agency v. Houston ISD* ("*TEA*"), No. 03-20-00025-CV, 2020 WL 1966314, at *1 (Tex. App.—Austin Apr. 24, 2020, mand. pending). There, the Court traced the long history of supersedeas in Texas, *id.* at *3, and examined its purpose "to preserve the status quo of the matters in litigation as they existed before the issuance of the judgment from which appeal is taken," *id.*at *1. The Court acknowledged that while "Rule 24.2(a)(3) governs the supersedeas issue in [an] interlocutory appeal," "if appellant is entitled to supersede without security by filing a notice of appeal, perfecting appeal from [an] interlocutory order suspends [the] challenged order." *Id.* (citing TEX. R. APP. P. 29.1(b)).

As Appellee appears to concede (Mot. 2, 7), under this well-established rule, the Secretary has a right—guaranteed by statute—to supersede the coercive effect of the preliminary injunction pending appeal. The Secretary exercised that right when she

filed her notice of appeal. The temporary injunction thus lacks any effect. The Court should deny Appellee's request for relief under Rule 29.3.

Still, Appellee asks the Court to order the trial court's temporary injunction "reinstated" under Rule 29.3. But the Secretary's statutory right to supersede the temporary injunction cannot be trumped by procedural rules. And even if this Court were to assume the authority to keep the injunction in place, it should decline Appellee's invitation to do an end-run around the entire supersedeas framework constructed by the Legislature, and validated by the Texas Supreme Court.

II. Rule 29.3 Does Not Authorize the Court to Deny the Secretary's Right to Supersede the Temporary Injunction.

Contrary to Appellee's assertion (Mot. 7), Rule 29.3 does not provide a freewheeling power to deny the Secretary supersedeas and "reinstat[e] temporary injunctions to prevent" alleged harm. Instead, it provides the Court limited authority, "[w]hen an appeal from an interlocutory order is perfected," to "make any temporary orders necessary to preserve the parties' rights until disposition of the appeal." TEX. R. APP. P. 29.3. Importantly, the Texas Supreme Court recently and unanimously held that Rule 29.3 does *not* enable a court of appeals to lift the automatic stay guaranteed by Civil Practice and Remedies Code § 51.014(b). *In re Geomet Recycling LLC*, 578 S.W.3d 82, 88 (Tex. 2019) (orig. proceeding). The Court explained that "procedural rules cannot authorize courts to act contrary to a statute" and that a court may not invoke Rule 29.3 to deny a party "its statutory right." *Id.*

That principle applies here: The Secretary has a statutory right to supersedeas. *See* TEX. CIV. PRAC. & REM. CODE § 6.001(a); *In re State Bd. for Educator*

Certification, 452 S.W.3d at 804. To the extent there was ever any doubt, the Legislature has now made that right abundantly clear. TEX. GOV'T CODE § 22.004(i) (directing the Texas Supreme Court to "adopt rules to provide that *the right of an appellant* under [§] 6.001(b)(1), (2), or (3), Civil Practice and Remedies Code, to supersede a judgment or order on appeal is not subject to being counter-superseded under Rule 24.2(a)(3), Texas Rules of Appellate Procedure, *or any other rule*") (emphases added). And, in the same section directing the Supreme Court to protect the State's supersedeas rights, the Legislature also provided that the Court does not have the authority to nullify statutory rights through procedural rules. *Id.* § 22.004(a) ("The supreme court has the full rulemaking power in the practice and procedure in civil actions, *except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant*." (emphasis added)).

To grant Appellee's request would vitiate the Secretary's (and, by extension, the State's) statutory right to supersedeas in any case involving a temporary injunction. Much of Appellee's motion is dedicated to arguing that—unless the Court takes this step—MOVE will suffer ongoing harm because it will continue to use resources for a telemedicine program. But by definition, when a trial court grants a temporary injunction, it has concluded that the plaintiff "is experiencing an ongoing injury." Mot. 8. This is one of the three elements that a plaintiff must show to obtain a temporary injunction. *Texas Ass'n of Bus. v. City of Austin*, 565 S.W.3d 425, 437 (Tex. App—Austin 2018, pet. denied). If that "burden is not discharged as to any one element," that plaintiff "is not entitled to extraordinary relief." *Dallas Anesthesiology Assocs., P.A. v. Texas Anesthesia Grp., P.A.*, 190 S.W.3d 891, 898 (Tex.

App.—Dallas 2006, no pet.). If merely satisfying that burden were sufficient to justify an exception to supersedeas, it would eviscerate the Legislature's decision to guarantee the Secretary an automatic right to supersede a temporary injunction.

Indeed, Appellee cites only three cases in support of the notion that appellate courts retain the ability to effectively order counter-supersedeas: this Court's decision in *TEA*, 2020 WL 1966314, at *5, and two cases that applied that decision, *Texas General Land Office v. City of Houston*, No. 03-20-00376-CV, 2020 WL 4726695, at *2 (Tex. App.—Austin July 31, 2020), and *State v. Texas Democratic Party*, No. 14-20-00358-CV, 2020 WL 3022949, at *1 (Tex. App.—Houston [14th Dist.] May 14, 2020). *See* Mot. 7. The State sought review of each of those decisions by a petition for writ of mandamus. *In re Tex. Educ. Agency*, No. 20-0404 (Tex., filed May 15, 2020); *In re State*, No. 20-0401 (Tex., filed May 15, 2020); *In re Tex. Gen. Land Office*, No. 20-0609 (Tex., filed Aug. 5, 2020). The Supreme Court has agreed to hear *TEA* on the merits with argument to be heard next week. App.1 at 3. And the Court granted temporary relief in the remaining two cases. App.2, 3. Such relief is only permissible when the Court has recached "the tentative opinion that relator is entitled to the relief sought" and "the facts show that relator will be prejudiced in the absence of such relief." *Republican Party of Tex. v. Dietz*, 924 S.W.2d 932, 932-33 (Tex. 1996) (per curiam) (citing former TEX. R. APP. P. 121). That the Supreme Court ordered temporary relief in those cases is strong evidence that it will revisit *TEA* and reach a different result, and *TEA* should neither be applied nor extended.[3]

[3] *In re Texas General Land Office*, No. 20-0609, remains pending—presumably so the Court can resolve it consistently with its ruling in *TEA*. *In re State*, No. 20-401, was

Even if the Supreme Court upheld the ruling in *TEA*, that case does not control here. This Court was careful to limit its holding to "th[e] situation" before it. *TEA*, 2020 WL 1966314, at *5. Specifically, *TEA* involved an administrative action that, if consummated, would not be subject to administrative review, thereby mooting the appeal and depriving the court of jurisdiction. *Id.* Appellee has alleged nothing of the sort here. Instead, for the reasons the Secretary will discuss fully in her merits briefing, Appellee is seeking to force the Secretary to adopt MOVE's policy preference, not prevent the violation of state or federal law.

Because there is no allegation that the Secretary will take any action to moot a claim that she has acted *ultra vires* during the pendency of this appeal, this case does not fit within the narrow circumstances found in *TEA* to permit an intermediate court to intercede under Rule 29.3. To the extent MOVE is asserting that this case falls within the *TEA* paradigm because the fast approaching election means that case will become moot simply by the passage of time, the assertion is without merit. MOVE has another remedy: It could have sought to expedite this appeal. Its choice not to do so does not justify this Court's creation of an exception to the Secretary's statutory right to supersede the temporary injunction.

To the contrary, this is precisely the type of case in which the Court should *not* intervene. As the Texas Supreme Court stated just two weeks ago, "[t]he United States Supreme Court has repeatedly warned against judicial interference in an election that is imminent or ongoing. 'Court changes of election laws close in time

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dismissed as moot after the plaintiffs in that case voluntarily nonsuited their claims with prejudice.

to the election are strongly disfavored.'" *In re Hotze*, No. 20-0739, 2020 WL 5919726, at *3 (Tex. Oct. 7, 2020) (quoting *Texas Alliance for Retired Americans v. Hughs*, No. 20-40643, slip op. at 3-4 (5th Cir. Sept. 30, 2020) (citing, *inter alia*, *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (noting Supreme Court's repeated emphasis that "lower federal courts should ordinarily not alter the election rules on the eve of an election.").

It would be perverse in light of that law to use that same exigency to create a judicial exception to the "Legislature's statutory directive . . . that the State's right to supersede a judgment is not subject to counter-supersedeas under Rule 24.2(a)(3) or any other rule." *TEA*, 2020 WL 1966314, at *5; *see also Johnson v. Williams*, No. 02-19-00089-CV, 2019 WL 6334689, at *2 (Tex. App.—Fort Worth Nov. 27, 2019, pet. denied) (mem. op.) ("Elections are political matters," which fall within the ambit of the Legislature; "courts may take jurisdiction of political matters only if the law has specifically granted such authority.") (quoting *Thiel v. Oaks*, 535 S.W.2d 1, 2 (Tex. App.—Houston [14th Dist.] 1976, no writ)).

III. Even if the Court Has the Authority to Grant Appellee's Request for Relief Under Rule 29.3, it Should Decline to Exercise That Authority.

Even if the Court did have authority under Rule 29.3 to "reinstate" the trial court's temporary injunction during this interlocutory appeal, Appellee cannot show entitlement to such relief. Though the merits are not at issue,[4] Appellee is not likely

[4] For that reason, the Secretary reserves her response to Appellee's characterization of the facts that Appellee contends the trial court found.

to prevail in this appeal, and the equities do not favor Appellee's requested relief for multiple reasons, several of which are of particular note here.

First, in its motion, Appellee seeks to portray its claim as being about the fundamental right to vote. It is not. Appellee's assertion that it is entitled to relief ignores that—as an artificial entity—MOVE does not have the right to vote.

Nor does § 102.002 abridge the right to vote of Texans. As Appellee acknowledges, "[t]he legal standard for the equal-protection analysis under article I, section 3 of the Texas Constitution is the same as the legal standard for the analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." Mot.App.2 at 11 (quoting *Gatesco Q.M. Ltd. v. City of Houston*, 503 S.W.3d 607, 621 (Tex. App.—Houston [14th Dist.] 2016, no pet.)). And federal law recognizes that the right to vote *does not include* a right to vote by mail—let alone a right to vote a late ballot, after the State's reasonable deadline to apply for a mail-in ballot has passed. *See McDonald v. Bd. of Elec. Comm'rs of Chi.*, 394 U.S. 802, 807 (1969); *Tully v. Okeson*, No. 20-2605, 2020 WL 5905325, at *1 (7th Cir. Oct. 6, 2020) ("The Supreme Court [has] told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail."). Thus, a mail-in ballot voter classification that does not "absolutely prohibit" some group from voting is subject to rational basis review. *See, e.g.*, *McDonald*, 394 U.S. at 807-08 (distinguishing between right to vote and right to vote by mail); *Texas Democratic Party v. Abbott*, 961 F.3d 389, 403 (5th Cir. 2020) (holding that rational-basis review likely applied to age-based mail-in ballot eligibility provision).

Section 102.002 easily meets the deferential rational-basis test. States have substantial authority to regulate elections "to ensure fairness, honesty, and order." *Texas Indep. Party v. Kirk,* 84 F.3d 178, 182 (1996) (citing *Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983)). *See also, e.g.*, *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959). One of the ways Texas does this is by allowing voters with disabilities to vote by mail, provided they request a ballot by the eleventh day before the election. This mail-in ballot application deadline ensures time for election administrators to prepare and mail ballots, time for voters to mark and return ballots, and time for election officials to tabulate and release election results. *See* TEX. ELEC. CODE § 86.007 (marked mail-in ballot must arrive before the time the polls close on election day or be postmarked by 7 p.m. on election day). At the same time, the provision allowing a late ballot serves as a safety valve for those who develop a disability after the mail-in ballot application deadline. This allowance for a late ballot is not extended to other voters who are eligible to vote by mail on the basis of age, absence from county of residence, or confinement in jail. This is eminently rational.

Section 102.002 remains constitutionally sound, even if a more rigorous test applies. Just days ago, the Fifth Circuit considered whether Texas's signature-verification requirement for mail-in ballots violated equal protection and concluded that it likely did not. *Richardson v. Hughs*, No. 20-50774, slip op. at 21-31 (5th Cir. Oct. 19, 2020). Applying *Anderson-Burdick* balancing, the panel faulted the lower court for its "individualized assessment of burdens," noting that "[e]xamining burdens on a plaintiff-by-plaintiff basis 'would effectively turn back decades of equal-protection jurisprudence.'" *Id.* at 22 (citation omitted). It pointed to *Burdick*, where

the United States Supreme Court held that "Hawaii's ballot access laws did not constitute a severe burden on the right to vote when any burden was borne '*only by those who fail to identify their candidate of choice until days before the primary*.'" *Id.* (quoting 504 U.S. at 436–37) (emphasis added). The Fifth Circuit concluded, "if we were '[t]o deem ordinary and widespread burdens like these severe' based solely on their impact on a small number of voters, we 'would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes.'" *Id.* at 23 (quoting *Clingman v. Beaver*, 544 U.S. 581, 593 (2005)).

Similarly here, the certification requirement applies only to voters who do not request a mail-in ballot by the deadline, and it is inappropriate to perform an "individualized assessment of burdens" in assessing the law's constitutionality. And even if such assessment were called for, there is no evidence that § 102.002 necessarily imposes a financial cost upon voters[5] or requires a voter to obtain a certification in person.[6] Nor is there evidence that a physician who diagnosed a person with COVID-19 would be unwilling to sign a § 102.002 certification.[7]

In sum, MOVE cites no authority for the proposition that voters who fail to apply for a mail-in ballot by Texas's reasonable deadline are entitled to nevertheless vote by mail. Nor could they. For more than 30 years, Congress has allowed states to limit the provision of late ballots to those who can demonstrate their need for such an

[5] 2.RR.69:12-15; 87:5-23.

[6] 2.RR.88:3—89:4.

[7] 2.RR.94:3-7, 16-19; 95:1-2.

accommodation. 52 U.S.C. § 20104. And the Fifth Circuit recently reiterated that such a limitation is far from unconstitutional, emphasizing that "mail-in ballot rules that merely make casting a ballot more inconvenient for some voters are not constitutionally suspect. The principle holds true even if 'circumstances beyond the state's control, such as the presence of the [coronavirus,]' or . . . possible postal delays, make voting difficult." *LULAC v. Hughs*, No. 20-50867, 2020 WL 6023310, at *6 (5th Cir. Oct. 12, 2020) (quoting *Texas Democratic Party*, 961 F.3d at 405) (citing *McDonald*, 394 U.S. at 810 & n.8).

Second, the fact that MOVE itself lacks a right to vote counsels against its request for relief because its own alleged injury cannot counteract that of the State. That is especially so given that MOVE is relying on an organizational theory of standing that this Court has expressly disclaimed. *Tex. Dep't of Family & Protective Servs. v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at *5 (Tex. App.—Austin Nov. 28, 2018, no pet.) (mem. op.), *reconsideration en banc denied*, No. 03-18-00261-CV, 2019 WL 6608700 (Tex. App.—Austin Dec. 5, 2019). As the Secretary will demonstrate in her merits brief, MOVE lacks standing to sue altogether, and thus cannot claim any injury—let alone one substantial enough to outweigh the injury caused by an injunction against the State.

Both the United States Supreme Court and the Texas Supreme Court have held that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (quotation marks omitted). And that harm is not an abstract injury to some disembodied concept. Courts do not protect the State's

"intrinsic right to enact, interpret, and enforce its own laws" for the benefit of the State as an entity, or even state officials. *State v. Naylor*, 466 S.W.3d 783, 790 (Tex. 2015); *see also State v. Hollins*, No. 20-0729, 2020 WL 5919729, at *6-7 (Tex. Oct. 7, 2020). Instead, courts protect the ability of the State to enforce its laws to protect the rights of its citizens in whose name, on whose behalf, and at whose direction those laws were created. *Cf. New York v. United States*, 505 U.S. 144, 181 (1992) ("State sovereignty is not just an end in itself," but "secures to citizens the liberties that derive from the diffusion of sovereign power."). When an appellate court refuses to allow the State to enforce its law pending appeal, all Texans suffer.

To balance these competing interests, the Legislature and the Texas Supreme Court have crafted a detailed framework for requesting and obtaining supersedeas and counter-supersedeas. This framework, embodied in such provisions as § 6.001, Rule 24, and Rule 29, represent a careful balancing of legal, policy, and equitable considerations. Were this Court to accept Appellee's invitation to make an end-run around this entire framework and—in effect—grant Appellee a counter-supersedeas that it could not otherwise obtain, the Court would upset this balance and arrogate to itself sole discretion over when supersedeas is appropriate.

The Court should decline Appellee's invitation. Under any circumstance, supersedeas involves a set of policy decisions that fall uniquely within the sphere of the political branches. *Ammex Warehouse*, 381 S.W.2d at 482. Here, that control over supersedeas is doubly important because Appellee is asking the Court to interfere with the course of an election *after voting is already under way.* As the Fifth Circuit just reiterated, "[s]tates have critically important interests in the orderly

administration of elections and in vigilantly reducing opportunities for voting fraud." *LULAC*, 2020 WL 6023310, at *7. That risk is particularly acute for mail-in ballots. *Id.* "While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Id.* (alteration omitted) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 196 (2008)). And the Texas Legislature has decided that an appropriate way to do so is to limit voting of late ballots to those certified by a professional as having a recently originated disability. TEX. ELEC. CODE § 102.002. Appellee clearly disagrees with that policy choice, but it must be respected, particularly while the State exhausts its appeals.

PRAYER

The Court should deny Appellee's request for relief under Rule 29.3.

Respectfully submitted,

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Certificate of Service

I certify that on October 21, 2020, this document was served electronically on lead counsel for Plaintiffs via email to:

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/s/Anne Marie Mackin
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Assistant Attorney General

No. 03-20-00497-CV

In the Court of Appeals for the Third Judicial District Austin, Texas

RUTH HUGHS, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Appellant,

v.

MOVE TEXAS ACTION FUND,

Appellee.

On Appeal from the
419th Judicial District Court, Travis County

APPELLANT'S APPENDIX

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APPELLANT'S APPENDIX

THE SUPREME COURT OF TEXAS
Post Office Box 12248
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(512) 463-1312

Friday, October 2, 2020

Mr. David Jay Campbell
O'Hanlon, Demerath & Castillo
808 West Avenue
Austin, TX 78701
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Mr. Kyle Highful
Office of the Attorney General
PO Box 12548
Austin, TX 78711
* DELIVERED VIA E-MAIL *

RE: Case Number: 20-0404
Court of Appeals Number: 03-20-00025-CV
Trial Court Number: D-1-GN-19-003695

Style: IN RE THE TEXAS EDUCATION AGENCY; MIKE MORATH, COMMISSIONER OF EDUCATION IN HIS OFFICIAL CAPACITY; AND DORIS DELANEY, IN HER OFFICIAL CAPACITY

Dear Counsel:

Today the Supreme Court of Texas set the petition for writ of mandamus in the above-referenced cause for oral submission on **Tuesday, October 27, 2020**. Oral arguments begin at 9:00 a.m. If desired, counsel may call the Clerk's Office for the order of setting on **Friday, October 23, 2020**. Each side has been allotted **twenty (20) minutes** for oral argument. TEX. R. APP. P. No. 59. Oral argument will be held via Zoom. Attached is a guide for attorneys participating in oral arguments via Zoom. The Clerk of the Court will contact you with further instructions.

PLEASE NOTE it is the responsibility of the attorneys to determine who will present argument and how the allotted time will be shared. Please remember that each side, not each party, has been allotted twenty minutes for argument. Except with prior permission from the Court, only two attorneys may present argument for each side. TEX. R. APP. P. 59.5.

All attorneys must file the Oral Argument Submission Form through the eFileTexas.gov electronic filing system. The Oral Argument Submission Form is located at http://www.txcourts.gov/media/1436031/oral-argument-submission-form-copy.pdf.

FILE COPY

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Post Office Box 12248
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Please indicate on the Oral Argument Submission Form **only the attorney/s who will present oral argument**, and e-file the form no later than **Monday, October 12, 2020**.

Relator(s) is assessed a $75.00 fee for the submission and oral argument of the petition that will be collected when the form is e-filed.

Please note all notices or communication about this case will be sent by email in lieu of mailing paper documents. (*See* TEX. R. APP. P. 9.2(c)(7)).

Sincerely,

Blake A. Hawthorne, Clerk

by Claudia Jenks, Chief Deputy Clerk

cc: District Clerk Travis County (DELIVERED VIA E-MAIL)
Mr. Jeffrey D. Kyle (DELIVERED VIA E-MAIL)
Mr. Kevin T. O'Hanlon (DELIVERED VIA E-MAIL)
Benjamin Castillo (DELIVERED VIA E-MAIL)
Audra Welter (DELIVERED VIA E-MAIL)

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20-0401
5/15/2020 7:17 PM
tex-43030119
SUPREME COURT OF TEXAS
BLAKE A. HAWTHORNE, CLERK

IN THE SUPREME COURT OF TEXAS

NO. 20-0401

IN RE STATE OF TEXAS, RELATOR

ON PETITION FOR WRIT OF MANDAMUS

ORDERED:

1. Relator's emergency motion for temporary stay, filed May 15, 2020, is granted. The order dated May 14, 2020, in Cause No. 14-20-00358-CV, styled *State of Texas v. Texas Democratic Party, Gilberto Hinojosa, in his capacity as Chairman of the Texas Democratic Party, Joseph Daniel Cascino, Shanda Marie Sansing, Zachary Price, League of Women Voters of Texas, League of Women Voters of Austin Area, Workers Defense Action Fund, and MOVE Texas Action Fund*, in the Fourteenth Court of Appeals District is stayed pending further order of this Court.

2. The petition for writ of mandamus remains pending before this Court.

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IN THE SUPREME COURT OF TEXAS

NO. 20-0609

IN RE TEXAS GENERAL LAND OFFICE, AND GEORGE P. BUSH, NAMED IN HIS OFFICIAL CAPACITY AS TEXAS LAND COMMISSIONER

ON PETITION FOR WRIT OF MANDAMUS

ORDERED:

1. Relators' motion for temporary relief, filed August 5, 2020, is granted. The Order Reinstating the Trial Court's Temporary Injunction, dated July 31, 2020, in Cause No. 03-20-00376-CV, styled *Texas General Land Office and George P. Bush, named in his Official Capacity as Texas Land Commissioner v. City of Houston*, in the Court of Appeals Third District, is stayed pending further order of this Court.

2. The petition for writ of mandamus remains pending before this Court.

Done at the City of Austin, this Friday, August 21, 2020.

BLAKE A. HAWTHORNE, CLERK
SUPREME COURT OF TEXAS

BY CLAUDIA JENKS, CHIEF DEPUTY CLERK

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Associated Case Party: Ruth Hughes

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